RAJENDRAN M GURUSAMY

v.

PP

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB PATAIL J
[CRIMINAL REVISION NO: 43-8-2000]
19 JULY 2000

CRIMINAL PROCEDURE: *Prosecution - Conduct of prosecution by police officer - Validity of - Whether such officer authorized - Federal Constitution, art. 145(3) - Criminal Procedure Code, ss. 376, 377*

CRIMINAL PROCEDURE: *Revision - Revisionary power of the High Court - When power may be exercised - Criminal Procedure Code, s. 323(1) - Courts of Judicature Act 1964, s. 35*

The applicant in this case had been charged with an offence under s. 128(1) of the Road Transport Act 1987 for not having worn a seat-belt. The case now concerned the validity of a prosecution made against the applicant in the Magistrate's Court, the argument being that the police were not authorized by the Public Prosecutor to institute proceedings. Also considered was whether the decision in *Repco Holdings Bhd v. PP* was applicable.

Held:

[1] Whilst a party may apply for revision, there is no right per se to a revision. Any action is entirely at the discretion of the judge, which discretion must be exercised judicially, in the interest of justice, so as to ensure that substantial justice is done. In this case, it was proper to exercise the powers of revision as a decision in favour of the applicant could end the trial and save further costs and time.

[2] Based on art. 145(3) of the Federal Constitution, the Federal Attorney General cannot simply sign away the exercising of his discretion by a wholesale appointment of prosecutors under the 1998 amendments made to ss. 376 and 377 of the Criminal Procedure Code as that may be against art. 145(3) of the Federal Constitution requiring him to personally exercise his discretion.

[3] The case of *Repco Holdings Bhd v. PP* is acknowledged with reservations and therefore the prosecution ought to have tendered evidence of authorization by the Attorney General.

[Prosecution null and void.]

Case(s) referred to:
Johnson Tan Han Seng v. PP [1977] 2 MLJ 66 ***(refd)***
Kyohei Hosoi v. PP [1998] 1 CLJ 1063 ***(refd)***
Law Nai Chiok & Anor v. PP [1996] 3 AMR 2906 ***(refd)***
Long Samat & Ors v. PP [1974] 2 MLJ 152 ***(refd)***
Maleb Su v. PP & Another Appeal [1984] 1 MLJ 311 ***(refd)***
Marzuki Mokhtar v. PP [1981] 2 MLJ 155 ***(refd)***
PP v. Datuk Hj Harun Hj Idris & Ors [1976] 2 MLJ 116 ***(refd)***
PP v. Jamil Jilap [2000] 5 CLJ Supp 368 ***(refd)***
PP v Hoo Chang Chwen [1962] MLJ 284 ***(refd)***
PP v. Lee Ming & Anor [1999] 1 CLJ 379 ***(foll)***
PP v. Lim Shui Wang & Ors [1979] 1 MLJ 65 ***(refd)***
PP v. Pengurus, MBf Building Services Sdn Bhd [1998] 1 CLJ 678 ***(foll)***
PP v. RK Menon & Anor [1978] 2 MLJ 152 ***(refd)***
Quek Gin Hong v. PP [1998] 4 CLJ Supp 515 ***(refd)***
Repco Holdings Bhd v. PP [1997] 4 CLJ 740 ***(foll)***
Tennakoon D Harold v. PP [1997] 1 CLJ Supp 392 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 35
Criminal Procedure Code, ss. 323(1), 376(i), 377, 380, Chapter XXXI
Federal Constitution, art. 145(3)
Forests Enactment 1960 (Sabah), s. 40A
Forest Ordinance (Sarawak Cap 126), s. 92A
Immigration Act 1959/63, s. 58(2),
Road Transport Act 1987, ss. 44, 116, 119(2), 128(1)
Securities Commission Act 1993, s. 39
Securities Industry Act 1983, s. 126(2)

For the appellant - T Vijay; M/s T Vijay & Co
For the prosecution - Vong Poh Fah DPP

Reported by Mariette Peters-Goh

JUDGMENT

Abdul Wahab Patail J:

The Background

The applicant Rajendran a/l M Gurusamy had written through his solicitors for revision on a question of law as to the validity of a prosecution made against him in the magistrate's court. He had been charged with an offence under s. 119(2) of the Road Transport Act 1987 (the Act) read with s. 128(1) of the said Act. He had not been wearing a seat-belt. Now s. 116 of the Act provides:

> Proceedings for an offence under this Act shall not be instituted or conducted except by or on behalf of the Public Prosecutor or by a Police Officer or Traffic Warden, Dato Bandar or a Road transport Officer, or as respects prosecution for an offence against any order or rules made by an appropriate authority under Part III, by an officer of that appropriate authority.

The applicants' solicitors had objected before the magistrate, that the police were not authorised by the public prosecutor to institute the proceedings. The magistrate had ruled that the police could proceed with the proceedings, and ordered for trial to proceed.

Revision

The powers of the High Court in respect of revision is contained in chapter XXXI of the Criminal Procedure Code (the Code). Section 323(1) thereof provides that:

> A Judge may call for and examine the record of any proceeding before any inferior Criminal Court for the purpose of satisfying himself as to the correctness, legality or propriety of any sentence or order recorded or passed, and as to the regularity of any proceedings before such inferior Court.

As to revisions generally, it is trite that whilst a party may apply for revision, there is no right per se to a revision. Any action is entirely at the discretion of the judge, which discretion must be exercised judicially.

The solicitors in this case have written for revision. Interference in an on going trial is a course to be undertaken with utmost reluctance. Ordinarily, no appeal lies from a procedural ruling as in this case. Therefore an appeal lies only if there is a final order so that a trial once commenced may be allowed to proceed smoothly and the appealable issues dealt with in one appeal: see *Tennakoon D Harold v. Public Prosecutor* [1997] 1 CLJ Supp 392; *Law Nai Chiok & Anor v. Public Prosecutor* [1996] 3 AMR 2906; *PP v. Hoo Chang Chwen* [1962] MLJ 284; *PP v. RK Menon & Anor* [1978] 2 MLJ 152; *Marzuki bin Mokhtar v. PP* [1981] 2 MLJ 155 and *Maleb bin Su v. PP* & Another Appeal [1984] 1 MLJ 311. An application for revision should not be employed as an alternative route to an appeal. Nevertheless, the revisionary powers is a supervisory power to be exercised in the interest of justice, so as to ensure, notwithstanding the restrictions on appeal, that substantial justice is done.

In view of the fact the ruling appears to go against the trend of recent High Court decisions, and a decision in favour of the applicant may end the trial and save further costs and time, I have decided to act under s. 323(1) of the Criminal Procedure Code and s. 35 of the Courts of Judicature Act 1964.

The Case Law on Art. 145(3) Federal Constitution.

The question in this case was first dealt with in *Repco Holdings Bhd v. PP* [1997] 4 CLJ 740, where Gopal Sri Ram JCA, sitting as a High Court judge in October 1997 considered the following sections:

First, s. 126 of the Securities Industry Act 1983. It reads:

> 126(1) No prosecution for any offence under this Act shall be instituted except with the consent in writing of the Public Prosecutor.
>
> (2) A prosecution for any offence against any provision of this Act may be conducted by the Registrar or by any officer authorised in writing by the Registrar or by any officer authorised in writing by the Chairman of the Commission.

Second, s. 39 of the Securities Commission Act 1993. It reads:

> 39(1) No prosecution for any offence under this Act shall be instituted except with the consent in writing of the Public Prosecutor.
>
> (2) Any officer of the Commission authorised in writing by the Chairman may conduct any prosecution of any offence under this Act.

Both sections make it clear no prosecution may be instituted except with the consent in writing of the public prosecutor, and on the face of it, appears to repeat art. 145(3) of the Federal Constitution (the constitution) which provides that:

> 145(3) The Attorney-General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court-martial.

Notwithstanding that art. 145(3) did not contain the words 'shall have the sole power ...' instead of 'shall have power ...', Gopal Sri Ram JCA in *Repco Holdings Bhd v. PP*, after referring to art. 145(3), ss. 376 and 380 of the code said:

> It will be seen at once, from a reading of the plain language of art. 145(3), that the supreme law, namely the Federal Constitution, has committed to the hands of the Attorney-General the sole power, exercisable at his discretion, to institute, conduct and discontinue criminal proceedings.

and after citing Abdoolcader J (as he then was) in *PP v. Datuk Hj Harun bin Hj Idris & Ors.* [1976] 2 MLJ 116, 119 and the Federal Court in *PP v. Lim Shui Wang & Ors.* [1979] 1 MLJ 65, which dealt with the meaning of the phrase "institute, conduct or discontinue", Gopal Sri Ram JCA reasoned:

> It follows from the foregoing discussion that the only authority that is constitutionally entitled to conduct prosecutions is the Attorney-General as Public Prosecutor. The adjectival vehicle contained in s. 376 and subsequent sections of the Criminal Procedure Code put this beyond doubt. The question then arises: is Parliament entitled by written law to vest the power to conduct criminal prosecutions in an authority other than the Attorney-General?

and held:

> In my judgment, having regard to the authorities read before me, the expression 'conduct' appearing in art. 145(3) and in the two impugned subsections carries the same meaning. Since the constitution exclusively authorizes the Attorney-General to conduct prosecutions, it must follow, as night follows day, that no other authority may be lawfully empowered to exercise that function. Therefore, it is my opinion, that s. 126(2) of the SIA is ultra vires art. 145(3) of the Federal Constitution save to the extent I shall now indicate.

In particular he held:

> Section 126(2) as originally cast did not, in my judgment, contravene art. 145(3) because of the careful way in which it was drafted. On the other hand, s. 126(2) as presently worded cannot be read harmoniously with art. 145(3) to the extent I have earlier indicated.
>
> Turning now to s. 39(2) of the SCA, it is my judgment that this subsection wholly contravenes art. 145(3). By reason of art. 4(1) of the Federal Constitution, it being a law which is inconsistent with the constitution, the subsection gives way. I would declare it void and unconstitutional.

This was followed by Augustine Paul JC (as he then was) on 8 December 1997 in *Kyohei Hosoi v. PP* [1998] 1 CLJ 1063, who held that s. 58(2) of the Immigration Act 1959/63 to be unconstitutional, null and void:

> I must add that art. 145(3) expressly provides that the attorney general's powers to institute, conduct or discontinue any proceedings for an offence are exercisable at his discretion. The use of the word "discretion" in art. 145(3) means that the attorney has been endowed with the power to decide as he thinks fit (see *Johnson Tan Hang Seng v. PP* [1977] 2 MLJ 66). This was lucidly explained by the Federal Court in *Long bin Samad & Ors v. PP* [1974] 2 MLJ 152 where Suffian LP said at p. 158:
>
> > In our view, this clause from the supreme law clearly gives the Attorney-General very wide discretion over the control and direction of all criminal prosecutions. Not only may he institute and conduct any proceedings for an offence, he may also discontinue criminal proceedings which he has instituted, and the courts cannot compel him to institute or to go on with any criminal proceedings which he has decided to discontinue. (For the position in England, please see Viscount Dilhornes' speech at pp. 32-3 in *Smedleys Ltd v. Breed* [1974] 2 All ER 21). Still less then would the court have power to compel him to enhance a charge when he is content to go on with a charge of a less serious nature.

> Anyone who is dissatisfied with the Attorney-General's decision not to prosecute, or not to go on with a prosecution or his decision to prefer a charge for a less serious offence when there is evidence of a more serious offence which should be tried in a higher court, should seek his remedy elsewhere, but not in the courts.
>
> It is therefore manifestly patent that the discretion to institute a prosecution is within the exclusive domain of the Attorney General. That brings into focus the validity of s. 58(2) of the Act which authorizes the director general of immigration to sanction the institution of a prosecution. ....

It is noted while *Repco Holdings Bhd v. PP* dealt with the conduct of prosecutions, *Kyohei Hosoi v. PP* dealt with power to institute prosecutions.

Repco Holdings Bhd v. PP was also followed by Suriyadi J in *Quek Gin Hong v. PP* [1998] 4 CLJ Supp 515 who held that s. 44 of the act which endowed the director general with powers at par with the Public Prosecutor was void for inconsistency with art. 145(3) of the Federal Constitution. Similarly, in *PP v. Lee Ming & Anor* [1999] 1 CLJ 379 Ian Chin J, while expressing certain reservations, followed *Repco Holdings Bhd v. PP* and held that s. 92A of the Forest Ordinance, (Sarawak Cap 126), which empowers the state attorney general or any legally qualified officer authorised by him, the director of forestry, and any forest officer or any public officer authorised generally or specially by the director of forestry to conduct criminal prosecutions, to be unconstitutional, null and void.

In *PP v. Jamil bin Jilap* [2000] 5 CLJ Supp 368, Richard Malanjum J, following *Repco Holdings Bhd v. PP* and *PP v. Lee Ming & Anor,* held that s. 40A of the Forests Enactment 1960 (Sabah) to be unconstitutional, null and void:

> Power to prosecute and to institute legal action etc
>
> (1) The Director may prosecute any offence or institute any action, suit or other proceedings relating to any matter under this Enactment.
>
> (2) In any prosecution, action, suit or other proceedings to which this section applies, the Director may appear personally or may be represented by the State Attorney-General, any legal officer of the State Attorney-General's Chambers or of the Forestry Department, or any authorised officer.

KC Vohrah J, in *PP v. Pengurus, MBf Building Services Sdn Bhd* [1998] 1 CLJ 678 had occasion on 3 December 1997 to address a similar issue. The issue before him was whether in the absence of a provision in the Environmental Quality Act 1974 stating that no prosecution for any offence under the said act can be instituted except with the sanction or

consent of the attorney general, there can be any institution of proceedings for an offence under the 1974 Act. He too held, after extensive reference to *Repco Holdings Bhd v. PP* that:

> It is therefore manifestly patent that the discretion to institute a prosecution is within the exclusive domain of the Attorney General.

The Effect Of *Repco Holdings Bhd v. PP*

Repco Holdings Bhd v. PP introduced the notion that art. 145(3) gives sole or exclusive authority to the attorney general. Nothing in the previous authorities such as *Long bin Samat & Ors v. PP* [1974] 2 MLJ 152 FC, *Johnson Tan Han Seng v. Public Prosecutor* [1977] 2 MLJ 66 FC, suggested this. In my view there is a gulf of difference between (a) sole or exclusive authority over institution, conduct and discontinuance over all proceedings and prosecutions for offences, and (b) having a wide discretion and being completely independent as to his actions to institute, conduct or discontinue prosecutions and proceedings, including those originally instituted or conducted, until his intervention, by others.

Provisions giving powers to persons other than the attorney-general as the public prosecutor, to give sanction or consent, to institute or to conduct criminal proceedings under the respective legislation are commonly found. It appears in various local authority, statutory body, state and federal legislation. Some legislation do not provide who may institute and/or conduct prosecutions. It is plain and obvious that where the legislation in respect of the particular offence does not state who has power to institute, conduct or discontinue proceedings, the application of art. 145(3) means it is the attorney general who may do so. Indeed given art. 145(3), it is unnecessary, in any legislation where it is intended that only the attorney general may institute, conduct or discontinue criminal proceedings or prosecutions, to say that the attorney general shall have power to do so.

I have stated the issue for determination in *PP v. Pengurus, MBf Building Services Sdn Bhd* earlier above. It was held that prosecution may be instituted, but with certain preconditions:

> I do not wish to go into a discussion as to the differences between a sanction, consent or written authority but suffice it to say that where there is a requirement for any one of these examples of the exercise of discretion by the Public Prosecutor expressed in a law for the institution of a particular offence, it has to be manifested to the court before the court of law can take cognizance of such offence brought before it. Whether the exercise of discretion by the Public Prosecutor in respect of the institution of a particular offence under a law is through a sanction, consent or written authority the form is a matter of evidence which appraises the court that the Public Prosecutor has exercised his discretion before the court takes cognizance of the offence in accordance with what Parliament requires for that particular offence.

The effect of *PP v. Pengurus, MBf Building Services Sdn Bhd* is to make it clear that in the absence of any provision in a law to say that the public prosecutor may institute prosecutions under that law, the public prosecutor may nevertheless institute proceedings, and his action to institute proceedings may be manifested by either a consent, sanction or other form of authorisation.

By reading into art. 145(3) a sole, exclusive authority given by the constitution to the attorney general to institute, conduct and discontinue any proceedings for a criminal offence, *Repco Holdings Bhd v. PP* and the cases following it results, unavoidably from the logic employed in that case, in holding as unconstitutional, null and void provisions in all legislation that gives such powers to persons other that the attorney-general. The result is that:

1) a raft of provisions in legislation, both state and federal, giving powers to a) institute and/or b) to conduct criminal prosecutions for the offences to directors or officers of the relevant authorities require review;

2) the thousands of cases before the various courts without a sanction, consent or other authorisation before they were begun would be held to be instituted without the authority of the attorney-general, and therefore invalid;

3) the attorney-general is ill-equipped administratively to deal with all the applications for sanctions, consents and authorisations since blanket approvals are not a proper exercise of a quasi-judicial discretion;

The declaration in *Repco Holdings Bhd v. PP* that the ruling is prospective may well deal with cases already before the courts before 2 October 1997, but does not solve the other two, and cases filed after that date. This case is one such case.

These problems did not exist in the "overriding but non-exclusive power" interpretation to art. 145(3) which was the basis of the legislation. Such interpretation allowed parliament and state legislative assemblies to give power to other persons to institute, conduct and discontinue criminal prosecutions under the various legislation under federal and state laws, whilst art. 145(3) maintains the power of the attorney general to intervene at his own discretion at any time, and to take over any prosecution for an offence under any Federal or State law. *Repco Holdings Bhd v. PP*, the court did not consider this basis of legislation that did not preclude or prevent parliament and legislative assemblies of the states from conferring similar authority upon other persons in laws passed by parliament or the respective legislative assembly.

The Public Prosecutor

The Criminal Procedure Code created under s. 376 a legal entity not known to the constitution, namely the public prosecutor who, amongst other things, has control and direction of all criminal prosecutions and proceedings under the code:

376. Public Prosecutor.

(i) The Attorney General shall be the Public Prosecutor and shall have the control and direction of all criminal prosecutions and proceedings under this Code.

(ii) The Solicitor-General shall have all powers of a Deputy Public Prosecutor and shall act as Public Prosecutor in case of the absence or inability to act of the Attorney General.

(iii) The Public Prosecutor may appoint fit and proper persons to be Deputy Public Prosecutors who shall be under the general control and direction of the Public Prosecutor and may exercise all or any of the rights and powers vested in or exercisable by the Public Prosecutor by or under this Code or any other written law except any rights or powers expressed to be exercisable by the Public Prosecutor personally and he may designate any of such Deputy Public Prosecutors as Senior Deputy Public Prosecutors. [Am. Act A1015]

(iiiA) The Public Prosecutor may appoint fit and proper persons to be Assistant Public Prosecutors who shall be under the general control and direction of the Public Prosecutor and, subject to such limitations or restrictions as may be specified by the Public Prosecutor, shall have all the powers of a Deputy Public Prosecutor. [Ins. Act A1015]

(iv) The rights and powers vested in or exercisable by the Public Prosecutor by subsection (iii) and section 68 (ii) shall be exercisable by the Public Prosecutor personally.

It is apparent that while the federal constitution gave the power to the attorney general, parliament which itself is a creation of the constitution, proceeded to give away those powers under the code to the public prosecutor. Can parliament give away the powers given to the attorney general by the constitution? Those provisions of the code giving the powers of the attorney general to the public prosecutor and others could similarly be held to be unconstitutional, notwithstanding that the attorney-general and the public prosecutor are one and the same person, as I will explain below. The code, being ordinary legislation cannot be wedded to art. 145(3) as adjectival law because the latter is a supreme law.

Even though s. 58(2) of the Immigration Act referred to the public prosecutor, Augustine Paul J in *Kyohei Hosoi v. PP* with customary erudition confined himself to the exact term in art. 145(3), that is the attorney general, confining reference to the public prosecutor as follows:

> It is for the Public Prosecutor to decide, at his discretion, on the next course of action to be taken. It is perhaps appropriate for me to add that the stand taken by the Attorney General in this case through the learned Deputy Public Prosecutor in supporting the application by learned counsel is a commendable reflection of his role as the custodian of public interest to uphold the rule of law.

In *Repco Holdings Bhd v. PP* Gopal Sri Ram JCA did not differentiate between the attorney general or public prosecutor:

> It follows from the foregoing discussion that the only authority that is constitutionally entitled to conduct prosecutions is the Attorney-General as Public Prosecutor. The adjectival vehicle contained in s. 376 and subsequent sections of the Criminal Procedure Code put this beyond doubt. The question then arises: is Parliament entitled by written law to vest the power to conduct criminal prosecutions in an authority other than the Attorney-General?

In *PP v. Pengurus, MBf Building Services Sdn Bhd* Vohrah J dealt with the question as follows:

> So as to put the office of the Attorney General in the correct perspective so far as criminal prosecutions are concerned, s. 376 of the Criminal Procedure Code (the CPC) needs looking into. Section 376(1) provides that "[the] Attorney General shall be the Public Prosecutor and shall have the control and direction of all criminal prosecutions under this Code." In other words the sanctioning authority is the Public Prosecutor and he is invested with the control and direction of criminal prosecutions. Powers are vested in the Public Prosecutor (exercisable by him personally, see s. 376(4)) allowing him to appoint Deputy Public Prosecutors and these officers shall be under his general control and direction and they may exercise all rights and powers vested in and exercisable by him under the code or any other written law except any right or power expressed to be exercisable by the Public Prosecutor personally (see s. 376(3)).

Repco Holdings Bhd v. PP, reading s. 376 of the code as adjectival legislation, held that if the power to conduct prosecution is given to a person other than the attorney general as public prosecutor in a piece of legislation it is contrary to art. 145(3). But can s. 376 be read together with art. 145(3)? Since in 1957 the public prosecutor had already existed as an entity, it suggests that art. 145(3) did not intend to confer the power upon the public prosecutor but upon the attorney-general. It follows that it is more correct to say that a power given to the public prosecutor in a piece of legislation to institute and/or conduct prosecutions is contrary to

art. 145(3). Since the code is not part of the constitution but part of the general law of the country, it is in no better position than any other legislation. Then it follows also that its description as adjectival law confers no special interpretation. In this regard we must look at the wording of art. 145(3) and s. 376 of the code more closely. The constitution in unequivocal terms provide it is the attorney general who is given the power. To the extent s. 376(i) provides "The attorney general ... and shall have control and direction of all criminal prosecutions and proceedings under this Code', it is at best superfluous since that power is conferred already by a superior law, ie, art 145(3).

That s. 376(i) provides the attorney general shall be the public prosecutor may still fit within art. 145(3) and the structure of the code, but it lays the seeds of a legal uncertainty: The appointments of and delegations to senior deputy, deputy and assistant public prosecutors devolve from the public prosecutor and not from the attorney general. Further s. 377 of the code also for example provides that it is the public prosecutor, and not the attorney general who authorises and controls advocates, police officers, officers of government departments, local authorities, statutory authority or body in respect of conduct of criminal proceedings.

Indeed the code, like the other statute laws, is legislation not in the nature of a constitutional document which gave the power to persons having control and direction of all criminal prosecutions and proceedings, as well as persons having power to conduct criminal prosecutions quite separately from art. 145(3) which gave the power to the attorney general. If the premise of the cases above, that art. 145(3) gave sole authority to the attorney general, is accepted, then once the power is given by the constitution to the attorney general, parliament itself cannot by ordinary legislation direct that the attorney general's exclusive powers be delegated to other persons: such delegations can only be made by the attorney general and only if authorised by the constitution.

It would appear that a logic flaw occurred when s. 376 provided that the officers are authorised by and controlled by the public prosecutor when the constitution gave powers to the attorney general. Undeniably, the provision that the attorney general shall be the public prosecutor should be in the federal constitution rather than in the code. Reliance may then be placed upon Para. 4 of List 1 - federal list, in the ninth schedule list of the federal constitution for parliament to make laws, such as the Criminal Procedure Code to authorise the public prosecutor to appoint senior deputies, deputies, assistants and other persons and to authorize them to institute, conduct and/or discontinue prosecutions for offences.

In *Repco Holdings Bhd v. PP* Gopal Sri Ram JCA had also suggested, with regard to s. 126(2) of the Securities Industry Act 1983, that it would not be unconstitutional if or where the registrar is a gazetted deputy public prosecutor. With respect, if he is seconded as a registrar, he can no longer simultaneously discharge the functions of a deputy public prosecutor. A deputy public prosecutor who has been appointed a magistrate or a sessions judge ceases to be a deputy public prosecutor. In other words the exception mentioned is wholly illusory. It would be different if the registrar, rather than the individual holding that post, is gazetted as a deputy public prosecutor.

Under the view that the attorney general's power under art. 145(3) is an overriding but non-exclusive power, it would not be inconsistent with art. 145(3) for s. 377 of the code to create and give the power to the public prosecutor, his senior deputy, deputy and assistant public prosecutors, and other persons:

> 377. Conduct of prosecutions in Court.
>
> Every criminal prosecution before any court and every inquiry before a Magistrate shall, subject to the following sections, be conducted- [Am. by Act A1015]
>
> (a) by the Public Prosecutor, a Senior Deputy Public Prosecutor, a Deputy Public Prosecutor or an Assistant Public Prosecutor; [Subs. by Act A1015]
>
> (b) subject to the control and direction of the Public Prosecutor, by the following persons who are authorised in writing by the Public Prosecutor:
>
> (1) an advocate;
>
> (2) a police officer not below the rank of Inspector;
>
> (3) an officer of any Government department;
>
> (4) an officer of any local authority;
>
> (5) an officer of any statutory authority or body; or
>
> (6) any person employed or retained by any local authority or any statutory authority or body; [Subs. by Act A1015]
>
> Provided that in any district in which it may be impracticable, without an unreasonable amount of delay or expense, that such prosecutions or inquiries should be so conducted it shall be lawful for the Public Prosecutor from time to time, by notification in the Gazette, to direct that prosecutions may be conducted in that district by a police officer below the rank of Inspector.
> [Am. by Act A1015]

Where in the overriding but non-exclusive power interpretation other entities could institute, conduct or discontinue prosecutions for offences within their particular legislation, the *Repco Holdings Bhd v. PP* sole or exclusive power interpretation meant that all proceedings and prosecutions must be authorized by the public prosecutor, his senior deputy, deputy or assistant before they are instituted or conducted. Taking the *Repco Holdings Bhd v. PP* to its logical progression, the code itself may be held to be unconstitutional, with the result that all the cases must be dealt with by the attorney general himself. Clearly the attorney general himself would not be able to give his personal attention to all the files on all alleged offences.

Conclusions

The decisions in *Kyohei Hosoi v. PP, PP v. Pengurus, MBf Building Services Sdn Bhd* and Ian Chin J in *PP v. Lee Ming & Anor* [1999] 1 CLJ 379 accepted the basic premise in *Repco Holdings Bhd v. PP* to be correct that art. 145(3) confers sole or exclusive authority upon the attorney general to institute, conduct or discontinue proceedings for any criminal offence. The decision in *Repco Holdings Bhd v. PP*, it is recognised, creates the spectre of tremendous administrative problems of issuing authorisations a) to institute and b) to conduct criminal prosecutions. The foregoing are some of the questions as a result of the decision in *Repco Holdings Bhd v. PP*. Yet the public prosecutor did not appeal against decision in *Repco Holdings Bhd v. PP*.

With regard to the institution of criminal prosecutions the position is clear that where there is no mechanism for issue of sanction or consent by the attorney general to signify authorization under art. 145(3) to institute criminal proceedings, some form of authorization must be employed to show authorisation. The suggestion in *PP v. Pengurus, MBf Building Services Sdn Bhd*, should be adopted, since if there is no evidence of such authorisation, the magistrate or Sessions Judge, other than in a case where the attorney general personally appears, has no evidence or basis to hold the criminal proceeding is properly instituted.

Section 116 of the Road Transport Act envisaged that institution and conduct of prosecutions for offences under the act and regulations thereunder by persons other than the public prosecutor:

> Proceedings for an offence under this act shall not be instituted or conducted except by or on behalf of the public prosecutor **or** by a Police Officer or Traffic Warden, Dato Bandar or a Road Transport Officer, or as respects prosecution for an offence against any order or rules made by an appropriate authority under part III, by an officer of that appropriate authority.

To that extent it offends against the sole authority interpretation of *Repco Holdings Bhd v. PP*. It would not offend if "or" is removed, where the rest of the other officers would then be acting on behalf of the public prosecutor, but only if it is accepted that s. 376(i) of the code is accepted as not being contrary to art. 145(3) under an "overriding but non-exclusive authority" interpretation.

In this case, since s. 116 of the Road Transport Act 1987 has since been repealed, I make no order as to its constitutionality: a prospective order as in *Repco Holdings Bhd v. PP* would serve little purpose, and my reservations on the sole authority interpretation prevents me from applying the *Repco Holdings Bhd v. PP* interpretation retrospectively.

For the record, in respect of the order I make, I agree with the decision and reasoning of Ian Chin J in *PP v. Lee Ming & Anor*, in particular where he said:

> I do not think the Federal Attorney General can simply sign away the exercising of his discretion by a wholesale appointment of prosecutors under the said recent amendment to the Criminal Procedure Code as that may be against the Article requiring him to personally exercise that discretion. I cannot imagine our legislators burdening the Federal Attorney General with the minor offences which I have mentioned. For the reasons I have stated, I have my reservation about the correctness of the decision in *Repco Holdings Bhd v. Public Prosecutor* which I follow in part because I do not wish to add to the uncertainty regarding the pending cases.

A decision rejecting *Repco Holdings Bhd v. PP* now would have the effect of adding to uncertainty and confusion in the interpretation of art. 145(3), and which would be even more unacceptable, particularly if, as in those cases no appeal is made to a higher court which could have put the issues arising from the interpretation applied by *Repco Holdings Bhd v. PP* to rest. I would agree with the approach in *PP v. Lee Ming & Anor* to acknowledge *Repco Holdings Bhd v. PP* with reservations. Now, a decision in a criminal case is not like a decision in a civil suit, where the parties may agree even after a decision, and upon terms not necessarily following the decision. A decision in a criminal court is not subject to the pleasure of one party or the other choosing to obey it. Until it has been set aside on appeal *PP v. Pengurus, MBf Building Services Sdn Bhd* which rests upon the basic premise of *Repco Holdings Bhd v. PP*, must be complied with and the prosecution ought to tender evidence of authorisation by the attorney general, or at least the public prosecutor when the trial re-commences. Since no appeal had been filed, those decisions on art. 145(3) must be followed, not ignored.